Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION, et al., Plaintiffs, v. ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, and CROPLIFE AMERICA, et al., Intervenor-Defendants.	NO. C01-0132 C INTERVENOR-DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED ORDER GRANTING FURTHER INJUNCTIVE RELIEF

Pursuant to the Court's direction at the December 9, 2003 status conference, Intervenor-Defendants CropLife America, *et al*. ("Intervenors") hereby state their objections to the Proposed Order Granting Further Injunctive Relief lodged by Plaintiffs on December 15, 2003 ("Proposed Order").

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Since the form of the Proposed Order is derived from the proposed order Plaintiffs lodged with the Court on October 2, 2003, Intervenors reassert and incorporate by reference the objections stated in Intervenor-Defendants' Statement Joining In and Supplementing Federal Defendants' Proposed Form of Injunctive Relief (Oct. 2, 2003) ("Int. Statement"), and in Federal Defendants' Notice of Filing Form of Injunctive Order (Oct. 2, 2003 & Nov. 4, 2003) ("Fed. Notice of Filing"). Intervenors will not repeat those objections here, and instead will focus on the particular issues identified by the Court at the December 9 status conference. Without prejudice to Intervenors' opposition to the entry of any further injunctive relief in this matter,[1] Intervenors object to the Proposed Order as follows:

1. Intervenors object to the assertion in the first paragraph of the Proposed Order (at 1) that further injunctive relief is appropriate to "prevent adverse effects on threatened salmon and endangered salmonids." The Court's Orders of July 16, 2003 (at 3) and August 8, 2003 (at 16 & point heading IV) found only that buffer zones substantially contribute to the prevention of "jeopardy." Therefore, the Proposed Order's reference to "adverse effects" should be stricken.

2. Intervenors object to Paragraph II of the Proposed Order (at 2-3),[2] which purports to describe "salmon supporting waters." Intervenors ask the Court to substitute the counterpart language in first paragraph of Part II of the Order on Interim Relief previously proffered by the Federal Defendants, modified only (in accordance with the Court's Dec. 9 instructions) to include estuaries and to measure buffers from the ordinary high water mark. *See* Federal Defendants' [Proposed]

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[1] *See* Intervenors' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Further Injunctive Relief (Mar. 21, 2003); and Intervenor-Defendants' Prehearing Statement (Aug. 8, 2003). By tendering these objections to the Proposed Order, Intervenors are not consenting to any injunctive relief ordered by the Court or agreeing that any of the injunctive relief set forth in the Proposed Order is supported by law or the factual record. Intervenors' objections are without prejudice to, and do not constitute a waiver or compromise of, any claims and defenses they have raised in this case; and Intervenors expressly reserve any and all appeal rights in this case.

[2] The Proposed Order sometimes refers to its subdivisions as "Paragraphs" and sometimes as "Sections." Except when a direct quote from the Proposed Order requires otherwise, we will refer to them as "Paragraphs."

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Order on Interim Relief at 3-4. At the status conference, the Court endorsed the Federal Defendants' approach to defining "salmon supporting waters" as waters where salmon are actually present, not all waters that may be theoretically accessible to salmon. *See* Dec. 9 Tr. at 2-7. Intervenors believe that the Federal Defendants' wording reflects the intended limited use of the critical habitat designations as an overlay to identify which streams contain a given Evolutionarily Significant Unit ("ESU") of salmon. In contrast, Plaintiffs' wording is objectionable because it seems to make designated critical habitat the first step in the process of identifying salmon supporting waters, even though the National Marine Fisheries Service ("NMFS") has withdrawn most of those critical habitat designations (68 Fed. Reg. 55,900 (2003) (vacating critical habitat designations for 19 ESUs)), and even though critical habitat is overinclusive in that it encompasses many streams and other bodies of water where salmon are not actually present. *See* Dec. 9 Tr. at 5. In addition, the order should state that "salmon accessible waters" does not include manmade canals, irrigation ditches, or drainage systems. *See* Plaintiffs' Notice of Filing at 1-2. And, to avoid implying that the Court's choice of "ordinary high water mark" would encompass intermittent streams that do not have water in them at all times and do not support salmon, the order should state that intermittent streams are excluded.

3. Intervenors object to the wording of the third sentence of Paragraph III.A of the Proposed Order insofar as it refers to EPA's authorization of the use of "any Pesticide." *See* Proposed Order at 4, line 3. This phrase could be misconstrued to refer to literally *any* pesticide, rather than only to the 54 active ingredients that are identified in Paragraph I of the Proposed Order. To avoid this misinterpretation, Intervenors suggest that the phrase "any Pesticide" in the third sentence of Paragraph III.A be revised to read "any Pesticide identified in Paragraph I above."

4. Intervenors object to the failure in Paragraph III.A to exclude from the injunction those *uses* of products that EPA has determined will have no effect or is not likely to adversely affect listed salmon irrespective of the ESU. For example, notwithstanding that EPA made certain "may affect" determinations for chlorothalonil for certain ESUs on December 1, 2003, EPA also determined "[t]here will be no effect of chlorothalonil residential use, use on golf course greens and tees, or as a

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paint preservative *on any ESU*." *See* Letter from A. Williams, EPA to Laurie Allen, NMFS (Dec. 1, 2003) at 1 (emphasis added) (viewable at < http://www.epa.gov/oppfead1/endanger/effects/chloroth-ltr.pdf>). The injunction should, therefore, exclude all *uses* where EPA has made or in the future makes a "no effect" or "not likely to adversely affect" ("NLAA") determination irrespective of the ESU and Plaintiffs' exhibits 1 and 2. The exclusion should be reflected in Paragraph III.A ("Buffers"), and in Paragraph VI.3 ("Terminating Events").

5. In the final subparagraph of Paragraph III.A of the Proposed Order (at 6), Intervenors object to the inclusion of the words "provided that the National Marine Fisheries Service has not rejected or affirmatively failed to concur in the 'not likely to adversely affect' determination." This language is confusing and is unnecessary to convey the Court's straightforward decision to exempt pesticides for which EPA has made an NLAA determination. *See* Dec. 9 Tr. at 7. Accordingly, the quoted language should be stricken.

6. Intervenors object to Exhibit 2 to the Proposed Order insofar as it erroneously shows that no NLAA determination has been made for diuron-noncrop for the Snake River Sockeye Salmon. As correctly shown in Table C of Federal Defendants' Proposed Order, EPA has made an NLAA determination for diuron-noncrop for that salmon ESU, so that use should be excluded from the injunction.

7. Intervenors object to the first sentence of Paragraph III.B. of the Proposed Order insofar as it would impose certain buffer variations "instead of the injunctive relief provided for in Paragraph III.A." The quoted language is potentially confusing because Paragraph III.A both imposes injunctive relief and *excludes* from relief any pesticides for which EPA has made a "no effect" or NLAA determination; and because EPA has made such determinations for some uses of the active ingredients identified in the "buffer variations" in Paragraph III.B, including ethoprop, phorate, and propargite. To avoid implying that the buffer variations in Paragraph III.B would supersede the *exclusions* in Paragraph III.A, Intervenors suggest numbering the three existing sub-paragraphs of proposed Paragraph III.A as 1, 2, and 3, respectively; and then revising the first sentence of proposed

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Paragraph III.B. by changing "Paragraph III.A" at the end of that sentence to read "Paragraph III.A.1." This or a comparable revision is necessary to make clear that, if a pesticide or use is excluded from the injunction by reason of EPA's "no effect" or NLAA determination, the "buffer variations" in Paragraph III.B do not override the exclusion.

8. Intervenors request that the 1-yard buffer variation described in Paragraph III.B.1 for 1,3-dichloropropene (telone) products include application by drip tape, which entails application of small amounts through holes in a hose placed on the ground, is used in certain locations instead of subsoil injection, and like subsoil injection poses no risk of drift or runoff. *See* Aug. 14, 2003 Tr. at 55.

9. Intervenors object to the imposition of the 40-yard buffer for phorate in Paragraph III.B.3 of the Proposed Order. Since aerial application of phorate is prohibited (*see* entries for phorate in Exhibit 1 of Second Declaration of Seema A. Mahini, filed with Intervenors' Oct. 2 Statement), the proposed 40-yard buffer is double the 20-yard distance of the only applicable default buffer that Plaintiffs originally sought and that the Court recognized in its August 8, 2003 Order (at 18). Just as the Court declined Plaintiffs' request to double the buffer zone for aerial applications of fenbutatin-oxide (see Dec. 9 Tr. at 7-8), it should reject Plaintiffs' attempt to double the default buffer for ground applications of phorate.

10. For similar reasons, Intervenors object to the imposition of the 100-yard buffer on "any application of propargite" (i.e., ground or air) in certain ESUs under Paragraph III.B.4 of the Proposed Order, inasmuch as that conflicts with, and far exceeds, the 20-yard buffer for ground applications recognized by the Court.

11. There is a typographical error in the list of crops in Paragraph III.B.4. In the fifth line of that paragraph, "seed, alfalfa," which is a single crop, should be corrected to read "seed alfalfa."

12. In the noxious weed program exclusion in Paragraph III.D.*2* of the Proposed Order, Intervenors object to the inclusion of the extended description of "safeguards" that Plaintiffs believe "NMFS routinely requires for such programs." There is nothing in the record to demonstrate that

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NMFS "routinely requires" restrictions, much less showing what those alleged restrictions are. Intervenors ask that the noxious weed provision be revised to consist of a single sentence to parallel the public health vector provision in Paragraph III.D.1, so that Paragraph III.D.2 would read, in its entirety, "Use of the Pesticides for control of state-designated noxious weeds as administered by public entities."

13. There is a potential for confusion between Paragraphs III.B.5 and III.C.8, both of which deal with coumaphos. To eliminate the confusion, Intervenors suggest inserting a parenthetical in the opening language of III.B.5 so that it reads: "EPA's authorization of coumaphos (except pest control strips and cattle ear tags) for livestock use . . . ."

14. The application rate for bensulide in Paragraph III.C.2 of the Proposed Order should be revised to read "less than or equal to 6 pounds," to comport with Intervenors' submittal on which we understand this exclusion to be based. *See* entries for bensulide in Exhibit 1 of Second Mahini Declaration.

15. In the third sentence of Paragraph IV of the Proposed Order, Intervenors object to the introductory language "Therefore, in addition to the buffers imposed in Section III, ..." As already noted, Paragraph [Section] III not only imposes buffers, but also creates exclusions from the injunction. To make clear that the injunctive relief specific to urban pesticides does not apply to pesticides or ESUs for which EPA has made a "no effect" or NLAA determination, the introductory language of the third sentence of Paragraph IV should be revised to read, "Therefore, in addition to the buffers imposed in Paragraph III, and subject to the exclusions from injunctive relief identified in Paragraph III, ..."

16. Intervenors object to the proposed "Injunctive Relief Specific to Urban Pesticides" (Proposed Order Paragraph IV) for several reasons. At the hearing on August 14, 2003, the Court said it was reluctant to impose the drastic sales and use restrictions the Plaintiffs had sought, and the Court suggested a public education program as an alternative. *See* Aug. 14 Tr. at 22-26. Intervenors continue to be willing to participate in the program described in the Federal Defendants' Proposed

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Order (at 7) – a program to *educate* the public about how pesticides enter waters, their potential effects on salmon, the judicious use, storage, and disposal of pesticides, and ways to minimize the potential for pesticides to reach waters in urbanized areas. But Intervenors have numerous objections to the program described in the Proposed Order currently before the Court:

(a) At the December 9 status conference, the Court stated, "We're going to use the EPA proposal regarding the point of sale notice, and with the language as proposed by the plaintiffs in that point of sale notification." Dec. 9 Tr. at 13. Contrary to the Court's directive, the Proposed Order fails to replicate the EPA proposal, but modifies it substantially (e.g., by requiring the use of visuals, by requiring EPA to "ensure" that third parties outside its jurisdiction take certain actions, by reducing Intervenors' compliance time from 90 days to 60 days, and by expanding the scope of Intervenors' distribution duties from "major retail sales outlets" to "[unspecified] sales outlets"). Therefore, Paragraph IV.B of the Proposed Order should be stricken in its entirety and replaced with Paragraph V.B of EPA's proposed order.

(b) Intervenors strongly object to being affirmatively enjoined, under pain of contempt, to promulgate warnings and graphic visuals that discourage the use of the products they manufacture. There has been no judicial ruling that the use of these products jeopardizes salmon within the meaning of the ESA. Indeed, that determination is precisely what EPA's ongoing effects determinations and consultations (if necessary) are designed to ascertain. It would be premature to require, as a matter of *interim* relief, public "warnings" and signage about alleged hazards that may well not exist. Further, although the proposed order Plaintiffs submitted on October 2, 2003 would have required warnings to which Intervenors objected, it would not have required Intervenors, *but only EPA*, to promulgate the warnings. *See* Pls. Oct. 2 Prop. Ord. at 11-12. Ironically, the current Proposed Order's attempt to strike a middle ground between Plaintiffs' and EPA's proposals is inequitable because it would punish Intervenors by giving them the worst of both proposals – (1) their own duty to distribute, and (2) making them distribute material that discourages use of their products rather than educating the public about responsible use of those products. If, despite the objection in paragraph (d) below, the

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Court believes it has jurisdiction to charge Intervenors with an affirmative duty under this injunction, Intervenors ask the Court as a matter of fairness to reject Plaintiffs' warning language and visuals, in favor of the positive and constructive approach to educational content proposed by EPA. *See* Fed. Proposed Order at 7. Alternatively, if the Court's final order adopts Plaintiffs' proposed warning language and visuals, Intervenors' duty to distribute the material should be stricken as inequitable, punitive, and, in any case, redundant since EPA itself will be under a duty to ensure that point of sale notifications are made. *See* Proposed Order Paragraph IV.B, first subparagraph.

(c) Intervenors object to Plaintiffs' newly proposed visuals for several reasons. First, under the proposed order Plaintiffs presented to the Court on October 2, the graphic was to be "developed by EPA, in conjunction with the parties." Pls. Oct. 2 Prop. Ord. at 12. Plaintiffs now ask the Court, however, to require the use of graphics developed by a total stranger to this litigation – a single county in one of the three affected states – with no input from *any* party (other than possibly Plaintiffs themselves). At the very least, Plaintiffs should be held to their earlier commitment that the graphic be developed by EPA in conjunction with the parties. Second, Plaintiffs' proposed visuals, with their stop-sign shape, images of dead or distressed fish, and large-font "SALMON HAZARD" verbiage, are obviously designed to scare off potential users rather than educate them about the responsible use of pesticide products. Third, no "hazard" determination has yet been made by the Court or EPA. If the Court were to order the use of visuals, Intervenors would propose using one of the designs appended at Exhibit A to these Objections. Unlike the alarmist King County designs favored by Plaintiffs, Intervenors' designs are truly educational and are intended to remind the purchaser of the importance of proper use for the protection of salmon.

(d) The Court lacks jurisdiction under § 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), to enter injunctive relief against Intervenors – particularly *mandatory* injunctive relief requiring Intervenors to distribute material to sales outlets. ESA §11(g) only authorizes an injunction against a person who is "alleged to be in violation" of the Act, and who received sixty days' advance notice of the suit. As to Intervenors, this suit fails on both counts. First, the alleged violation

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of the Act –the *only* violation this Court has found – is EPA's *procedural* failure to comply with the consultation requirements of ESA § 7(a)(2) in the registration and re-registration of pesticides. *See* Aug. 8, 2003 Order at 5. Intervenors, as private entities, are incapable of violating § 7(a)(2), because that provision applies only to actions by federal agencies. Thus, there has been no finding of a violation of the ESA by any Intervenor. Second, no Intervenor received a sixty-day notice in advance of this suit. Since that notice is jurisdictional, *see Southwest Center for Biological Diversity v. Bureau of Reclamation*, 143 F.3d 515, 520-21 (9th Cir. 1998), Plaintiffs cannot obtain citizen suit injunctive relief against Intervenors.

(e) As Intervenors previously explained, the warning language "visuals" required by the Proposed Order would conflict with labeling provisions of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"). *See* Int. Statement at 4-5. Plaintiffs' response to this objection is not well taken. *See* Dec. 9 Tr. at 11-12. They rely on *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992), and *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989), which they mistakenly believe hold that point of sale notifications are not labeling and therefore are not regulated under the FIFRA process. *See* Dec. 9 Tr. at 11-12. In reality, both cases confirm that the warnings Plaintiffs would impose in this instance *are* labeling. In *Jorling*, the Second Circuit found that state-required warnings about the health effects of certain pesticides were not FIFRA "labeling" inasmuch as those warnings were not directed at the end user, but at members of the general public who unwittingly strayed upon an area where pesticides were present. *See* 874 F.2d at 119. The court contrasted those warnings with FIFRA labeling, which "is designed to be read and followed by the end user." *Id.* The Ninth Circuit is of the same view. Citing *Jorling* as the "leading case" interpreting FIFRA's definition of "labeling," the Ninth Circuit has held that health warnings required by a California law were not FIFRA "labeling" because they were directed towards alerting the general public about the carcinogenicity and reproductive toxicity of certain chemicals, rather than being designed for and followed by the end user. *Chemical Specialties*, 958 F.2d at 946. Since Plaintiffs' proposed warnings are clearly directed toward end users of the products, they would

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constitute modification of product labeling and cannot be imposed without compliance with FIFRA. *See* Int. Statement at 4-5; Fed. Notice of Filing at 5.

(f) Intervenors further object to Plaintiffs' proposed warnings because their product-specific nature poses enormous practical problems for them in a case of this complexity. To begin with, as EPA has explained, EPA's effects determinations and consultations are an ongoing process, with the status of active ingredients changing every four months under the schedule set by the Court. *See* Dec. 9 Tr. at 10-11. It would be extremely burdensome and costly for EPA to have to revise the warnings every time EPA makes an "effects" decision, and for Intervenors then to have to follow up by distributing the revised, pesticide-specific information. Second, even within a given pesticide active ingredient, the injunction would only apply to *some* ESUs, because for at least three of the urban-use pesticides (diuron, carbaryl, and diazinon) that would be covered, EPA has made some "no effect" or NLAA determinations. Plaintiffs' proposed warning language and visuals, although intended to be product-specific, are objectionable because they take no account of these *ESU-specific* differences; and because, if they were to take account of such differences, they would entail an unmanageable array of wording depending on which product was sold and where. *See* Dec. 9 Tr. at 10-11.

17. Intervenors object to the Plaintiffs' proposed effective date of two weeks after the order is entered (Paragraph V). Given the substantive nature of the order and the need for adequate notice to the many affected entities, Intervenors propose an effective date no earlier than 30 days following the date the order is entered – the same that is required under the Administrative Procedure Act for new or amended federal regulations. *See* 5 U.S.C. § 553(d).

18. In Paragraph VI.2 of the Proposed Order (at 13), Intervenors object to the inclusion of the language "provided that the National Marine Fisheries Service has not rejected or affirmatively failed to concur in the 'not likely to adversely affect' determination." This language is confusing and is unnecessary to convey the Court's straightforward decision to exempt pesticides for which EPA has made an NLAA determination. *See* Dec. 9 Tr. at 7. Accordingly, the quoted language should be stricken.

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19. Intervenors object to Paragraph VIII.1's provision requiring EPA to "instruct registrants to ensure that pesticide distributors, wholesalers, retailers, brokers, dealers and others in privity with them, are made aware of this injunction." Registrants are not parties to this action (indeed, Plaintiffs successfully opposed motions by several of them to intervene), are not within this Court's ESA citizen suit jurisdiction (*see* Objection 16(d) above) and therefore cannot be subject to mandatory injunctive relief that is effectively directed at them. This language is further objectionable because compliance by registrants is impossible – although they can *inform* other entities with whom they directly deal about this injunction, they have no way of "ensuring" awareness, and they have no way of identifying with certainty all the entities in the lengthy chain of commerce the quoted language describes (particularly the indefinite "others in privity with them").

20. Intervenors object to Paragraph VIII.2 of the Proposed Order insofar as it would require Intervenors to "ensure" that their members are "made aware" of the referenced orders. Intervenors have informed, and can and will continue to inform, their members about this Court's orders, but as a practical matter cannot "ensure" that each and every one of their members will actually be "aware" of the orders. In addition, because the Court's July 16, 2003 Order is essentially a preliminary version of the Court's August 8, 2003 Order, Intervenors believe that further notification concerning the July 16 Order is unnecessary and could serve to confuse rather than clarify members' understanding of the grounds for the Court's ruling. For these reasons, Intervenors request that proposed Paragraph VIII.2 be revised to read as follows:

> Defendant-Intervenors are ENJOINED to inform their members of:
> (1) this Court's Orders dated July 2, 2002, and August 8, 2003; and
> (2) this injunction.

21. Intervenors join in and incorporate by reference the objections to the Proposed Order lodged by the Federal Defendants.

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DATED this 19th day of December, 2003.

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EXHIBIT A

Protect Salmon

These products contain pesticides that may harm salmon or steelhead if misused and allowed to enter salmon streams

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